IN THE SUPREME COURT OF FLORIDA
STATE OF FLORIDA
500 South Duval Street
Tallahassee, Florida 32399-1927

CASE NO.: SC16-289
L.T. NO.: 2005-CF-011551

ROBERT PETERSON,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

On Appeal from the Fourth
Judicial Circuit, in and for Duval County, Florida

Honorable Lawrence P. Haddock
Judge of the Circuit Court, Division CR-F

APPELLANT'S INITIAL BRIEF

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PRELIMINARY STATEMENT

ROBERT PETERSON will be referred to as "Appellant" or "Peterson." The State of Florida will be referred to as "Appellee" or "the State."

References to the Record on Appeal for the Direct Appeal will be designated "R" with the volume number, followed by the page number, for instance (1 ROA 1). References to the Postconviction Record on Appeal for the Initial Brief will be designated "PCR" with the page number following, for instance (PCR 1).

STATEMENT OF THE CASE

On December 15, 2005, Peterson was indicted on one count of first-degree murder (Count One) one count of possession of a firearm by a convicted felon (Count Two), one count of use of firearm during the commission of a felony (Count Three), and one count of tampering with evidence (Count Four). He was tried on Counts One and Four from August 11, 2009, through August 13, 2009. On August 13, 2009, the jury returned a verdict, finding him guilty of one count of first-degree murder and guilty of one count of tampering with evidence.

On September 8, 2009, by a vote of 7-5, the jury recommended a sentence of death for First Degree Murder. On December 10, 2009, the Circuit Court ordered Mr. Peterson to death and a sentence of five years for tampering with evidence to run concurrently.

In count one for first-degree murder, the trial court found the following statutory aggravators: the capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification (great weight); the capital felony was especially heinous, atrocious, or cruel (great weight); the capital felony was committed for pecuniary gain (great weight). No statutory mitigators were offered. The court considered the following non-statutory mitigators: the defendant has a long and well documented history of drug abuse (slight weight); the defendant has skills as a mechanic (little weight); the defendant is a good son (not proven, no weight); a sentence of death would have a serious negative impact on others (not proven, no weight); the defendant was a good friend (slight weight); the defendant contributed to the community (slight weight); the defendant has been an exceptional inmate per the comments of Officer Fisette (slight weight); the defendant exhibited good and mannerly behavior throughout the court proceedings (not proven, no weight); the defendant is amenable to rehabilitation and a productive life in prison (not proven, no weight).

On May 17, 2012, the Florida Supreme Court affirmed Peterson's convictions and sentences on direct appeal. Peterson v. State, 94 So. 3d 514 (Fla. 2012). On December 10, 2012, Peterson's convictions became final when the United State Supreme Court denied Peterson's Petition for Writ of Certiorari.

Peterson v. Florida, 133 S. Ct. 793 (2012). Peterson timely filed a Motion to Vacate his judgment and sentence on November 11, 2013. (PCR 173-253)

In the Motion to Vacate his judgment and sentence, Peterson raised a total of ten claims for relief, alleging: (1) Peterson's due process rights were violated when counsel lost or destroyed records; (2) ineffective assistance of counsel; (3) Peterson was denied his constitutional right under the rules prohibiting Peterson's lawyers from interviewing jurors and was denied effective assistance of counsel; (4) a Brady violation; (5) Peterson was denied mental health assistance; (6) Florida's capital sentencing scheme is unconstitutional; (7) Duval County's prosecutors use of death penalty is arbitrary and violates the Eighth Amendment; (8) Florida's use of death penalty violates the Eighth Amendment; (9) cumulative error; and (10) Peterson is innocent of First Degree Murder. (PCR 173-253)

On April 10, 2014, the trial court held a case management conference regarding evidentiary hearing claims. That same day, after reviewing pleadings and hearing argument from counsel, the trial court entered an "Order on Huff Hearing" granting an evidentiary hearing on Grounds I, II, and IV. The trial court found that all other claims could be resolved as matters of law. (PCR 367)

The trial court held the evidentiary hearing on Peterson's Motion to Vacate Judgment and Sentence in four parts: September 2, 2014 – September 4, 2014; December 15, 2014, and December 18, 2014; March 10, 2015 – March 11, 2015,

and May 8, 2015. Peterson filed his "Closing Argument Regarding Evidentiary Hearing Held on 3.851 Motion for Postconviction Relief" on July 13, 2015. (1 PCR 964-999) The trial court denied Peterson's Motion for Postconviction Relief on August 4, 2015. (PCR 1001-1079)

Prior to the evidentiary hearing, a Motion to recuse the trial court due to bias was filed March 31, 2014, due to an order issued by the trial court in another case regarding mitigation specialists. The trial court stated, "this court should not and will not codify or institutionalize the burgeoning cottage industry of former paralegals or social workers who are ardent death penalty opponents who declare themselves to be 'mitigation experts' and demand exorbitant fees from the judicial system for doing work that any competent paralegal or investigator could do for one-third of the cost." (PCR 358-364) The trial court denied the Motion to Recuse on April 1, 2014. (PCR 365-366) On April 23, 2014, Peterson timely filed a Petition for Writ of Prohibition, challenging the trial court's denial of his initial motion to disqualify the trial judge. (FSC Case No.: SC14-784) The Petition was denied without prejudice by this Court and preserved to raise on appeal. (FSC Case No.: SC14-784)

On March 6, 2015, Peterson filed a Motion to exclude the testimony of the State's expert, Alan J. Waldman, M.D., who conducted a neuropsychiatric examination of Peterson, under the Daubert/Frye standard. (PCR 829-831)

Additionally, included in Peterson's Evidentiary Hearing Closing Argument, Peterson claimed that Dr. Waldman's testimony should be given no deference by the trial court in considering granting him a new trial and penalty phase. (PCR 964-999) The trial court denied Peterson's Motion to exclude the testimony of Dr. Waldman on August 4, 2015, which was included in the trial court's order denying Peterson's Motion for Postconviction Relief. (PCR 1001-1079)

Postconviction hearing

Peterson presented seven witnesses at the postconviction evidentiary hearing concerning his 3.851 claim that trial counsel was ineffective in his guilt phase and penalty phase representation. The facts elicited from this evidentiary hearing are summarized as follows:

Charles Fletcher: Fletcher was Peterson's attorney and appointed as first chair. Fletcher did not hire a mitigation specialist because his second chair, "penalty phase" counsel, James Nolan, had resources at the Regional Conflict Counsel ("RCC") office including "the RCC office investigators, secretaries, all of those things." (PCR 1213) Fletcher reasoned that "some judges won't appoint a mitigation specialist" (PCR 1213) Although he concedes that he did not even file a motion to appoint a mitigation specialist, and acknowledged that Mr. Nolan relied on Fletcher's experience to conduct the mitigation investigation. (PCR 1213)

Fletcher didn't think Peterson's case needed a mitigation specialist because Nolan was investigating all of the witnesses that were already provided to them by prior counsel. (PCR 1214) However, Fletcher acknowledged this was Nolan's first death penalty case. (PCR 1213) Fletcher also assumed Nolan had experience looking for statutory mitigation and mental health mitigation. (PCR 1214)

Fletcher knew Peterson came from a poor neighborhood, he knew Peterson did not perform well in school, and that he had problems at work. (PCR 1258) He was aware that Peterson had family members with substance abuse problems, had a history of family violence, and that Peterson was sexually abused by family members. (PCR 1259-1260) Fletcher also acknowledged that Peterson had severe head trauma as a youth. (PCR 1270) Despite knowing this critical information, Fletcher decided not to seek statutory mitigators. (PCR 1263) He further acknowledged that the State was asking for the two weightiest aggravators, and he acknowledged mental health problems as one of the weightiest mitigators considered by this Court. (PCR 1264) Regardless of this, Fletcher made the decision not to put on any mental mitigation. (PCR 1265) Fletcher admitted to deliberately choosing to put on non-statutory mitigation and deliberately chose to disregard all statutory mitigation, despite requests from medical experts for additional testing. (PCR 1272)

Fletcher acknowledged that Dr. Krop, a psychologist, wasn't provided the necessary records he requested. (PCR 1262) Dr. Krop requested additional records and also recommended an MRI and PET scan and a complete neurological examination. (PCR 1262) Fletcher conceded there would not have been a strategic decision to withhold notes. (PCR 1262) Fletcher acknowledged that both Dr. Krop and Dr. Jacqmein recommended full neurological examinations, and he made the decision not to go through with the testing. (PCR 1267-1269) Fletcher was also aware that Dr. Krop stated that head trauma could potentially cause frontal lobe damage. (PCR 1270) Despite this information, Fletcher and Mr. Nolan made the decision to not call any experts during the penalty phase of the trial. (PCR 1245) In fact, it was noted that Fletcher's first billing entry for discussion of penalty phase strategies was on August 17, 2009, approximately six days after Peterson's trial began. (PCR 1252) Moreover, Dr. Morton, a psychopharmacologist, was not contacted by Nolan until approximately ten days after the jury returned a verdict in favor of death and only testified at the Spencer Hearing. (PCR 1330)

During the time Fletcher represented Mr. Peterson, he had six other death penalty cases he was also handling. He did not submit any Freedom of Information Act requests and he did not produce or request subpoenas for records. (PCR 1230) Moreover, there was one crucial witness in Peterson's case, Jimmy Jackson, whose conversation with Peterson severely impacted Peterson's case. Fletcher

acknowledged that Mr. Jackson owed Peterson money. (PCR 1232) Despite this information, Fletcher chose not to take Mr. Jackson's deposition nor interview him. (PCR 1231) Fletcher did not file a motion requesting Brady material regarding Jimmie Jackson. (PCR 1231-32) The conversation between Peterson and Mr. Jackson was recorded and used against Peterson during trial. Fletcher waived authentication of the tape. (PCR 1236) Fletcher did not ask for any items to be examined for DNA, did not ask for any fingerprints to be taken, and did not take any depositions. (PCR 1240) He did not subpoena anyone to the trial, did not file any motions to suppress Peterson's cell phone, and did not conduct any additional discovery. Although Fletcher argued death penalty motions on behalf of Peterson, he was not the author of any motion nor did he amend the motions. He testified that he begrudgingly filed "three or four" motions about ten days before trial because the client was whining at him. (PCR 1239) Approximately 15 or 16 of the motions were canned motions requesting the trial court to overrule the Florida Supreme Court and the United States Supreme Court in regard to the death penalty being unconstitutional. Fletcher agreed these motions were extremely short in nature.

Fletcher accepted the State's DNA results and did not request to have the DNA sent to other laboratories for verification, despite feeling that the DNA was worth pursuing because hairs located at the scene of the crime belonged to

someone else. He did not have any of the items found at Peterson's hotel room tested. (PCR 1761-1762) Fletcher also did not have any of the biological evidence found at the crime scene examined by an expert. (PCR 1762) Fletcher refused to believe his client's defense in regard to his taped confession solely based on the way Peterson talked and his common sense. (PCR 1765) He further acknowledged that he did not present any witnesses to testify about facts surrounding the drug sale referenced in the taped confession. (PCR 1770-71) Fletcher stated that Mr. Nolan was in charge of Peterson's penalty phase; however, he conceded that this was Mr. Nolan's first death penalty case. (PCR 1213)

Traci Sloan: Traci Sloan is an employee of the Regional Conflict Counsel ("RCC")'s office. Ms. Sloan testified that was she was and had been responsible for retrieving and storing files at RCC. (PCR 1191) Fletcher testified he transported the 11 trial boxes to RCC after the guilt phase of Peterson's trial. However, Ms. Sloan did not receive nor was there any record of receiving the 11 trial boxes that were in Fletcher's possession after his representation of Peterson. (PCR 1192) Ms. Sloan also had no recollection of Fletcher bringing the 11 trial boxes to the RCC office. (PCR 1192) These lost 11 trial boxes impeded collateral counsel's ability to represent Peterson during post-conviction proceedings.

Jeff Lewis: Jeff Lewis is Regional Conflict Counsel ("RCC") for the First District Court of Appeal region. Mr. Lewis rebutted the testimony of Charles

Fletcher that a mitigation specialist was not hired because his second chair counsel, James Nolan, had resources at the Regional Conflict Counsel office. (PCR 1358) Mr. Lewis testified that Mr. Nolan was not paid any additional money for his work on Peterson's case. (PCR 1358) Mr. Lewis generated a report demonstrating the amount of money RCC spent in Peterson's defense, and the total amount was $14,458.13, with approximately $7,000 or $8,000 spent in court reporting fees. (PCR 1360)

Sara Flynn: Sara Flynn is a mitigation specialist and a licensed clinical social worker. Ms. Flynn completed her undergraduate degree from the University of North Carolina, obtained a Master's degree in social work, and is a licensed clinical social worker in the State of Florida. (PCR 1365)

Ms. Flynn interviewed Peterson on two separate occasions. Additionally, Ms. Flynn interviewed six witnesses in Peterson's case, including: Roy Edmunds, Casty Hobbs, Dennis Noel, Ben O'Steen, Melanie Parris, and Lisa Peterson. (PCR 1363) Ms. Flynn found a "long list" of mitigating factors that could have been used in the penalty phase. She listed the mental, physical, and sexual abuse Peterson has endured and been exposed to. She listed all of the environmental factors. She listed the genealogical factors, including family history of mental illness. She listed the substance abuse concerning not only Peterson, but his father as well. Ms. Flynn diagnosed Peterson with long-standing history of diagnosed depression and anxiety

as a result from post-traumatic stress disorder. Ms. Flynn also diagnosed Peterson with a long history of substance abuse. (PCR 1363-1503)

Dr. Robert Ouaou: Dr. Ouaou is a clinical psychologist with a specialization in neuropsychology. Dr. Ouaou evaluated Peterson on two separate occasions. (PCR 1540)

Dr. Ouaou performed standard neuropsychological assessment battery on Peterson, which consisted of several tests in addition to a clinical interview. (PCR 1540) Dr. Ouaou also evaluated Peterson to see if there was evidence of brain injury. Dr. Ouaou was provided with several records, including medical records that demonstrated that Peterson had suffered multiple head injuries beginning in early childhood. (PCR 1540) Dr. Ouaou was also provided a photograph of Peterson that Dr. Ouaou stated was "compelling." (PCR 1535) The compelling photograph was taken directly after or soon after Peterson's suggested brain injury around age twelve. (PCR 1535) Based on the medical records and the photograph, Dr. Ouaou determined that Peterson had post-traumatic amnesia which is amnesia, or memory loss, during the time around the incident. It is an indicator of severe head injury. (PCR 1536) In the photograph, Peterson had swelling and contusions on the left frontal part of his head, and he appeared to have lost consciousness for a period of time. (PCR 1536) Dr. Ouaou's test findings were consistent with not only multiple traumatic brain injuries, but "this one was severe enough to have residual

effects that were measured today and most likely have existed since that time." (PCR 1537) Dr. Ouaou further testified that it was a significant head injury because it occurred during a period of time where there is key development in this area of the brain that was most likely damaged. This damage has a significant effect on how one moderates their behavior as an adult and is able to conform to social norms. (PCR 1537) Dr. Ouaou's test findings also indicated that Peterson showed "lateralization of function" and showed problems on the left side of his brain. As a result, Peterson had verbal scores that were significantly lower than his non-verbal scores. (PCR 1537)

Dr. Ouaou testified that Peterson showed defects of executive function that can be localized to the left side of the brain. (PCR 1538). Executive function is not just the ability to cover tracks, but it's the ability to disinhibit behaviors with potential harm. (PCR 1538) Specifically with frontal lobe functioning, there are certain emotional situations which might override a person's ability to control their behavior. (PCR 1538) Peterson appeared to have a history of psychiatric illness and cocaine dependence, all of which affect his ability to control his emotions. (PCR 1541)

Peterson also demonstrated signs of defects on neuropsychological assessment that are associated with multiple brain injuries and could have a

significant effect on his behavior as an adult. (PCR 1541) Dr. Ouaou stressed that effects of childhood head trauma can last until adulthood. (PCR 1541)

Dr. Ouaou testified that Peterson demonstrated an abnormal neuropsychological assessment and showed signs of defects that are related to a history of traumatic brain injuries. These brain injuries are specifically related to a history of frontal and left hemisphere head injures which could have a "significant effect on his behavior." (PCR 1541) Peterson had a history of documented psychiatric illnesses which were poorly and minimally treated by a family care doctor. Peterson was only given medication, more drugs, and was not referred to a psychiatrist or psychologist. (PCR 1542) Dr. Ouaou also testified that Peterson had a severe cocaine addiction and stressed that all of these things "lower the threshold to conform social behaving to social norms." (PCR 1542) Dr. Ouaou stated that testing is absolutely necessary to make the determination whether someone has some type of mental or emotional impairment. Dr. Ouaou further testified that it is common for an individual suffering from post-traumatic stress disorder to self-medicate with narcotics. (PCR 1549-50) Dr. Ouaou testified that his clinical impression of Peterson was multiple head injuries, in particular the one that occurred at age twelve had an impact on the testing he performed. There was also evidence of brain injury that might be significant and "has not been fully evaluated up to this point." (PCR 1551)

Dr. Steven Gold: Dr. Gold is a psychologist, professor, and director of the trauma clinic at Nova Southeastern University. (PCR 1578) Dr. Gold evaluated Peterson to assess his history in order to identify whether there was trauma and other factors in Peterson's background, especially during childhood that are likely to affect his adult functioning. (PCR 1579) Dr. Gold relied on the reports of people present in Peterson's life in order to determine if Peterson's self-reporting could be corroborated. (PCR 1579) Dr. Gold reviewed the social history prepared for by mitigation specialist, Sara Flynn; the testimony of Dr. Morton, a psychopharmacologist, who testified at the Spencer Hearing; as well as medical records prepared by Peterson's physician, Dr. Jacqmein. (PCR 1579)

At the evidentiary hearing, Dr. Gold testified that trauma is a specific type of event defined as either directly being confronted with or witnessing death, serious physical injury or sexual violation. (PCR 1579) In addition to other factors, repeated trauma, especially during childhood, has an extremely negative impact on an individual's development in a number of areas, including emotional functioning, intellectual functioning, and social functioning. (PCR 1579) Dr. Gold further testified that traumatic events that occur during childhood often last lifelong, especially when an individual doesn't receive treatment. (PCR 1579) Trauma is a significant mental and emotional impairment. Dr. Gold defined post-traumatic stress disorder as a specific disorder that only occurs in response to a

traumatic event and that person is, in various ways, haunted by that event. The individual finds the horrible event intruding on their awareness. (PCR 1580) In addition, their physiological activity is chronically elevated, and their thinking and their mood is negatively altered by the event. (PCR 1580) Dr. Gold relied on Peterson's self-reporting and reports of other people who were present when he was growing up to corroborate what he reported. (PCR 1582) Dr. Gold opined that it is absolutely necessary to have a competent and full social history before or while you evaluate whether someone has trauma or complex trauma. (PCR 1583-84)

In evaluating Peterson, Dr. Gold relied upon studies that have identified ten factors in a person's childhood as being significantly related to various forms of both psychological impairment and even medical impairment. (PCR 1585) Dr. Gold's findings indicated that Peterson's history included all ten of those adverse factors in his childhood. (PCR 1586) Dr. Gold stressed that it's not just about the factors in and of themselves and the impact they have, but the general atmosphere in which a child is growing up, which is not conducive to optimal development. (PCR 1587) Dr. Gold found that Peterson sustained childhood physical abuse at the hands of his stepfather, Bobby Jenkins, his Uncle Ronald, and by his maternal grandfather. (PCR 1587) Peterson also was subject to physical neglect since he grew up in substandard housing where there was a leaking septic tank right outside

of his bedroom window where he slept. (PCR 1587) Peterson was verbally and emotionally abused by his mother, his stepfather, Bobby Jenkins, his grandfather, and his uncle who killed several pet rabbits in front of him. (PCR 1587) Peterson was emotionally neglected by his mother, largely due to the fact that she was absent during his growing up years, his family didn't protect him, and in many ways didn't take care of him. (PCR 1588) Peterson was also sexually abused by his Uncle Ronald. (PCR 1588) Peterson's parents were also divorced during his childhood when he was only five or six years old. (PCR 1588) Peterson was extensively exposed to domestic violence in the home. His parents were frequently violent towards each other; Peterson's mother shot at his father on more than one occasion, and his mother was often beaten by his stepfather. Peterson also witnessed his grandfather beat his grandmother. (PCR 1588) Peterson grew up with a household member in prison when his father was sentenced to prison in the 1970's and he was taken to visit him there. (PCR 1588) Peterson also grew up in a household with an alcohol or drug problem. His father, his grandfather, and his uncles all abused drugs and alcohol. (PCR 1589) Peterson grew up in a household where a family member was chronically depressed, mentally ill, or suicidal. His grandmother was severely mentally ill, psychotic, and was treated in an inpatient psychiatric facility. (PCR 1589) Peterson's Uncle Jimmy, who he considered his hero, also committed suicide when Peterson was a child. (PCR 1589) Dr. Gold

testified that the presence of all ten factors is very rare. (PCR 1589) Peterson "grew up in a very chaotic situation where he was not receiving the resources that a child needs in order to reach adulthood with anywhere near the adequate functioning. (PCR 1589-90)

In addition to the ten factors, Dr. Gold testified that Peterson had several other traumatic events occur in his life. Peterson was exposed to several incidents of rape. Peterson's first wife was raped early in their marriage, and he was present while his second wife was raped. (PCR 1594) Peterson also witnessed his grandmother being raped by his grandfather while he was hiding under the bed. He saw his grandmother bleeding and heard her crying after it occurred. (PCR 1594) Peterson also witnessed his grandfather beat up his father and was told that his father was dead as a result of that incident. (PCR 1595) He often heard his mother and stepfather, Bobby Jenkins, have loud sex in the next room and his grandmother would rock and sing him to sleep in order to comfort him because he believed his mother was being hurt. (PCR 1595)

Dr. Gold testified that due to these traumatic events experienced by Peterson, he is subject to a wide range of possible effects, including: post-traumatic stress disorder, depression, anxiety, substance abuse, anger, and difficulty controlling anger. (PCR 1596) Peterson is also subject to several medical risk factors such as increased likelihood of abusing drugs, increased likelihood of

engaging in unprotected and promiscuous sex, and an increased likelihood of various medical problems such as diabetes or heart disease. (PCR 1596) Each additional factor in one's background increases the severity and range of difficulties, both psychological and medical, that a person is likely to have. The factors are exacerbated; two factors are worse than one, and so on. (PCR 1595) The intensity and range of difficulties increase with each additional factor. (PCR 1597)

Dr. Gold emphasized that a person could not determine someone had trauma simply by looking at that person (as trial counsel alleged) and one would have to talk to them in a clinical setting in order to make that determination. (PCR 1597-98) A child requires necessary resources that were not present in Peterson's life, including: supervision, care, and guidance. (PCR 1598) Dr. Gold testified that Peterson indicated his parents were too intoxicated and involved in abusing drugs and alcohol to be attentive to him. (PCR 1600) In addition to the negative impact of traumatic factors, there is also absence of the necessary factors for normal development psychologically. (PCR 1598) More generally, growing up with people who routinely engage in criminal behaviors or nonconforming behaviors makes it difficult for a child, and later an adult, to recognize where the dividing line is between acceptable and unacceptable behavior. (PCR 1599) Dr. Gold testified that when individuals are brought up with people who routinely violate the

law, they are more likely to violate the law than people who grow up demonstrating socially responsible behavior. (PCR 1599)

Dennis Peterson: Dennis Peterson is Peterson's brother; they share the same father. (PCR 1336) Dennis Peterson testified their father sold drugs to "pretty much his whole neighborhood." (PCR 1338) Dennis Peterson witnessed his father sell drugs and would accompany him to the strip club in order for him to conduct his drug transactions. Dennis Peterson was around ten or eleven years old at this time. (PCR 1338) Peterson would be present with his father when he was selling drugs and witnessed a lot of drug transactions occur. (PCR 1339) The neighborhood Peterson lived in was rough. (PCR 1340) Dennis Peterson witnessed his father get in fights on at least a dozen occasions. (PCR 1340-41) Their father sold cocaine, marijuana, quaaludes – just about any drugs. (PCR 1341) Dennis Peterson testified that no one requested for him to go to court and he would have been available to testify at any time during the proceedings. (PCR 1341-43)

STANDARD OF REVIEW

The Court's standard of review following a denial of a post-conviction claim where the trial court has conducted an evidentiary hearing accords deference to the trial court's factual findings. McLin v. State, 827 So.2d 948, 954 (Fla. 2002). However, the trial court's findings must be supported by competent, substantial

evidence. Blanco v. State, 702 So.2d 1250, 1252 (Fla. 1997). The trial court's legal conclusions are reviewed de novo. Sochor v. State, 883 So.2d 766, 771 (Fla. 2004).

Conflict of interest issues are mixed determinations of law and fact; the appellate court defers to the lower court's factual findings that are supported by competent substantial evidence and reviews the legal conclusions *de novo*. See Stephens v. State, 748 So. 2d 1028, 1032 (Fla. 1999); U.S. v. Novaton, 271 F.3d 968, 1010 (11th Cir. 2001).

CLAIM I

THE TRIAL COURT ERRED IN DENYING PETERSON'S MOTION TO RECUSE OR DISQUALIFY BASED ON THE TRIAL COURT EXCEEDING ITS PROPER SCOPE OF INQUIRY BY DETERMINING FACTS AND ADJUDICATING THE QUESTION OF DISQUALIFICATION.

Inquiry under rule providing for disqualification of presiding judge focuses on reasonableness of defendant's belief that he or she will not receive fair hearing. Rogers v. State, 630 So. 2d 513, 515 (Fla. 1993)(citing Livingston v. State, 441 So.2d 1083, 1086 (Fla. 1983)). The inquiry focuses on the reasonableness of the defendant's belief that he or she will not receive a fair hearing:

> [A] party seeking to disqualify a judge need only show a well-grounded fear that he [or she] will not receive a fair trial at the hands of the judge. It is not a question of how the judge feels; it is a question of what feeling resides in the affiant's mind and the basis for such feeling. The question of disqualification focuses on those matters from which a litigant may reasonably question a judge's impartiality rather than the judge's perception of his ability to act fairly and impartially.

Id. at 1086 (quotation marks and citations omitted). Facts alleged in the motion need only show that the party making it has a well-grounded fear that he will not receive a fair trial at the hands of the judge. If the attested facts supporting the suggestion are reasonably sufficient to create such a fear, it is not for the trial judge to say that it is not there. Id. at 1087 (quotation marks and citations omitted). The ultimate inquiry is "whether the facts alleged would place a reasonably prudent person in fear of not receiving a fair and impartial trial." *Id.* This determination must be based solely on the alleged facts—the presiding judge "shall not pass on the truth of the facts alleged nor adjudicate the question of disqualification." Fla.R.Crim.P. 3.230(d).

In Bundy v. Rudd, this Court has repeatedly held that a judge who is presented with a motion for his disqualification shall not pass on the truth of the facts alleged nor adjudicate the question of disqualification. When a judge has looked beyond the mere legal sufficiency of a suggestion of prejudice and attempted to refute the charges of partiality, he has then exceeded the proper scope of his inquiry and on that basis alone established grounds for his disqualification. 366 So.2d 440, 442 (Fla. 1978).

On March 31, 2014, Peterson filed a timely Motion to Recuse or Disqualify the lower tribunal Circuit Court Judge, Hon. Lawrence Haddock, due to bias

against the work of mitigation specialists and the heavy reliance on mitigation work done by a mitigation coordinator in the instant case. (PCR 358-365)

The trial court first made clear its opinion towards mitigation specialists in the case of Tajuane Dubose, which was addressed by the First District Court of Appeal in Criminal Specialist Investigations, Inc. v. State, 58 So. 3d 883 (Fla. 1st DCA 2011). The First DCA, in the Criminal Specialist Investigations case summarized the lower Court's opinion of mitigation coordinators stating, "[the lower court] opined that Florida law did not recognize any such position as that of a mitigation coordinator," and that the mitigation coordinator had already been paid too much and that the overpayment of mitigation coordinators was becoming a trend in capital cases. Id. The court further stated, "a general investigator or paralegal could have accomplished the same results for much less money." Id. The First DCA stated that based on the court's comments, along with the lack of opposition to the motion to pay the mitigation coordinator by JAC, it appeared that the court denied the motion based on the court's opinion that there was no position under Florida law known as "mitigation coordinator." Id. at 886.

The First DCA stated, however, that "relevant legal authorities establish that 'mitigation coordinator' or 'mitigation specialist' is the title of a legitimate job related to the defense of criminal defendants who are eligible for the death penalty," and these individuals are indispensable to the defense team. Id.

Despite this opinion overruling the trial court, the same judge reiterated his feelings toward mitigation specialists in the case of State v. Bevel, Case No.: 16-2004-CF-4525. The mitigation coordinator appointed for the Bevel case was Sara Flynn, a licensed clinical social worker in the State of Florida, with over 15 years of experience and involvement in more than 180 cases, 139 of which are death penalty cases. Ms. Flynn is also the mitigation specialist appointed to Peterson's case.

Specifically, the trial court made the following statement in its Order Denying Amended Motion for Post-Conviction Relief: "[t]his court should not and will not codify or institutionalize the burgeoning cottage industry of former paralegals or social workers who are ardent death penalty opponents who declare themselves to be 'mitigation experts' and demand exorbitant fees from the judicial system for doing work that any competent paralegal or investigator could do for one-third of the cost."

Due to the trial court's prior negative statements regarding mitigation specialists, Peterson reasonably believed that bias was alive and well in his case and thus, Peterson would not receive a fair hearing.

In the trial court's Order Denying the Motion to Recuse or Disqualify, the trial court alleged his words were taken out of context and there was no evidence to demonstrate that proper weight would not be given to the evidence presented by

mitigation specialists. (PCR 365-66) However, given this Court's holding in Bundy, the trial court erred when it exceeded its proper scope of inquiry by passing on the truth of the facts alleged by Peterson and adjudicating the question of disqualification based on its own perception of bias and impartiality. 366 So.2d 440 (Fla. 1978).

CLAIM II

THE TRIAL COURT ERRED IN DENYING PETERSON'S MOTION TO EXCLUDE THE TESTIMONY OF STATE'S EXPERT, DR. ALAN J. WALDMAN, BASED ON HIS FAILURE TO MEET THE DAUBERT STANDARD AND THE LOWER COURT'S FINDINGS ARE NOT SUPPORTED BY COMPETENT SUBSTANTIAL EVIDENCE.

The State retained neuropsychiatrist Dr. Alan J. Waldman to evaluate Peterson and rebut the testimony provided by neuropsychologist, Dr. Ouaou. Dr. Waldman performed a series of tests and clinically interviewed Peterson in order to determine whether or not Peterson was malingering his illnesses. However, the Court should give no deference to the testimony of Dr. Waldman due to his refusal or inability to perform and conduct standardized tests accepted in his particular field of expertise. Dr. Waldman failed to use standards and controls and evaluated Peterson based on his experience and subjective opinion. Dr. Waldman's demeanor throughout the entire evaluation of Peterson was combative, argumentative, and hostile, causing Peterson to feel "bullied" throughout the examination. Moreover,

Dr. Waldman didn't request further documentation to corroborate what Peterson described to him during his evaluation. (PCR 1837)

The Daubert standard is a rule of evidence regarding the admissibility of expert witness testimony. In Daubert v. Merrell Dow Pharm., Inc., the Supreme Court ruled that Federal Rules of Evidence, Rule 702, did not incorporate the Frye "general acceptance" test as a basis for assessing the admissibility of scientific expert testimony, but that the rule incorporated a flexible reliability standard instead. The Court addressed factors to consider in determining the admissibility of expert witness testimony, which includes: (1) whether the expert's technique or theory can be or has been tested---that is, whether the expert's theory can be challenged in some objective sense, or whether it is instead simply a subjective, conclusory approach that cannot reasonably be assessed for reliability; (2) whether the technique or theory has been subject to peer review and publication; (3) the known or potential rate of error of the technique or theory when applied; (4) the existence and maintenance of standards and controls; and (5) whether the technique or theory has been generally accepted in the scientific community. 509 U.S. 579 (1993). Effective July 1, 2013, Florida became a Daubert state, and adopts the standard in F.S. §90.702. Florida joins forty other states and the United States Federal courts in using the Daubert standard.

Dr. Waldman administered the M-FAST when evaluating Peterson despite his acknowledgment that he doesn't like that particular test. (PCR 1841) Dr. Waldman testified at the Evidentiary Hearing that he did not read Peterson the instructions of the M-FAST test before conducting the examination, although he agreed it would be important to read the questions verbatim from the test booklet, and the instruction manual explicitly says to. (PCR 1846) He also testified that he wasn't sure if the M-FAST was a screening test, when manual is clear it is. (PCR 1846) When cross examined regarding the series of questions he asked Peterson, Dr. Waldman testified that the questions were not standardized and were based solely on his experience as a psychiatrist. (PCR 1896) Dr. Waldman stated that questions asked incorrectly should still be scored. (PCR 1999) Dr. Waldman further testified that he wasn't aware that the M-FAST is recommended to be given in corroboration with other standardized tests. (PCR 1842) Dr. Waldman testified that he interrupted Peterson during the examination, which he agreed was contrary to the standardized method. (PCR 1905) Dr. Waldman could not articulate the proper method for conducting the examination nor describe the proper instructions the test booklet contained. (PCR 1946) Dr. Waldman further stated that he based Peterson's effort on the fact that he performed too slowly, although he acknowledged other factors could contribute to Peterson's slow ability. (PCR 2090) Dr. Waldman admitted the specific timeframe during which Peterson should

have completed his task was subjective. (PCR 1848) Dr. Waldman could also not articulate what the standard deviation or score should be for someone similar to Peterson. (PCR 2013-14)

In a Daubert analysis, courts have considered whether the expert has adequately accounted for obvious alternative explanations. See Claar v. Burlington N.R.R., 29 F.3d 499 (9th Cir. 1994) (testimony excluded where the expert failed to consider other obvious causes for the plaintiff's condition). See Ambrosini v. Labarraque, 101 F.3d 129 (D.C. Cir. 1996) (the possibility of some uneliminated causes presents a question of weight, so long as the most obvious causes have been considered and reasonably ruled out by the expert). Dr. Waldman testified that he determined Peterson did not suffer from post-traumatic disorder based solely on the fact that Peterson could not accurately describe his symptoms. (PCR 1914) Dr. Waldman also testified that Peterson did not give his full effort based on his slow response, but when questioned whether other factors could have contributed to Peterson's slow response, Dr. Waldman agreed. Furthermore, during Peterson's examination, Dr. Waldman asked him whether or not he feels depressed most of the time, to which Peterson answered true. At the Evidentiary Hearing, Dr. Waldman testified that it doesn't surprise him that a person who lives on death row is depressed most of the time. (PCR 1981)

In regard to Daubert, courts have also considered whether the field of expertise claimed by the expert is known to reach reliable results for the type of opinion the expert would give. See Kumho Tire Co. v. Carmichael, 119 S.Ct.1167, 1175 (1999) (Daubert's general acceptance factor does not "help show that an expert's testimony is reliable where the discipline itself lacks reliability, as for example, do theories grounded in any so-called generally accepted principles of astrology or necromancy."), Moore v. Ashland Chemical, Inc., 151 F.3d 269 (5th Cir. 1998) (en banc) (clinical doctor was properly precluded from testifying to the toxicological cause of the plaintiff's respiratory problem, where the opinion was not sufficiently grounded in scientific methodology); Sterling v. Velsicol Chem. Corp., 855 F.2d 1188 (6th Cir. 1988) (rejecting testimony based on "clinical ecology" as unfounded and unreliable).

Dr. Waldman was appointed by the state to determine whether or not Peterson was malingering. However, Dr. Waldman testified that he only gave one objective malingering test, the MFAST, which he also testified that he did not like. (PCR 1834) Dr. Waldman also testified that he wasn't sure whether or not the M-FAST identified itself as a screening test, and could not recall what the acronym of the test stood for. (PCR 1845) Dr. Waldman testified that he did not read the instructions of the M-FAST before conducting the examination, although he agreed the instructions are important and should be read verbatim. (PCR 1847) Dr.

Waldman further testified that he was aware the answer choices of the M-FAST are required to be read verbatim. However, Dr. Waldman testified he did not read the answer choices verbatim to Peterson. (PCR 1976)

In a Daubert analysis, it has also been recognized that the more subjective and disputed the opinion, the more likely it will be excluded when the opinion is based solely on experience and expertise. Daubert Reliability, 1 Fla. Prac., Evidence Section 703.2 (2014 ed.) Dr. Waldman evaluated Peterson based on a purely subjective approach. In determining whether or not Peterson suffered from post-traumatic stress disorder, Dr. Waldman disregarded Peterson's description of his symptoms because he couldn't articulate properly the correct symptoms. (PCR 1834) Dr. Waldman conceded that he asked very few questions about post-traumatic stress disorder. (PCR 1832) Dr. Waldman further acknowledged that one of the questions he asked Peterson about post-traumatic stress disorder was, "Do you have it?" (PCR 1914) Dr. Waldman testified that he told Peterson on numerous occasion that his problems weren't really problems (PCR 1916) and certain symptoms were ridiculous. (PCR 1916) Dr. Waldman testified that Peterson's description of auditory hallucinations were odd and inconsistent with psychosis. (PCR 1896, 1898) Dr. Waldman stated that somebody planted the word paranoia in Peterson's mind to describe how he was feeling. However, Dr.

Waldman conceded that he did not have any evidence of that determination. (PCR 1899)

Dr. Waldman's combative demeanor during his evaluation of Peterson was evident throughout his testimony at the Evidentiary Hearing. Dr. Waldman testified that he told Peterson his effort was poor. (PCR 2017-2018) Dr. Waldman's combative demeanor was further demonstrated when he discussed with Peterson his sexual abuse as a child. Dr. Waldman testified that he asked Peterson, "He didn't fuck you in the ass though?" Dr. Waldman acknowledged that this question was inappropriate. (PCR 1949)

Dr. Waldman's inability to perform standardized practices was further corroborated by Dr. Frederick, a psychologist, who specializes in the area of detection of malingering and forensic psychological assessment. (PCR 2167-2168) Dr. Frederick testified at the Evidentiary Hearing on behalf of Peterson that Dr. Waldman did not follow standardized procedures for administering the M-FAST, and he did not follow the instructions given by the author to ensure the method was reliable and valid. (PCR 2167-2168) Dr. Waldman administered the tests incorrectly and "the results cannot be trusted because of that." (PCR 2168) Dr. Frederick further stated that there were at least six instances where Dr. Waldman administered the test incorrectly, including his failure to read the instructions to introduce the test which are an "essential element of giving that test." (PCR 2168)

Dr. Frederick testified that Dr. Waldman didn't read several questions in a standard fashion, meaning he did not follow the structure of the question correctly in the way the test was designed to be administered. (PCR 2468-2469) Dr. Frederick stressed that "if you don't follow the instructions, the interpretation is meaningless, and that's the situation that we have here." (PCR 2173)

Dr. Frederick further corroborated that the M-FAST was designed to have a high false positive rate and was a screening test. (PCR 2174) He testified the intention of the test is to identify all possible malingers so one can follow up with a more comprehensive assessment of malingering. (PCR 2174) Dr. Frederick testified that Dr. Waldman failed to give an item analysis. The item analysis is when the test administrator "looks at the items themselves to see if there's a rational explanation for the answer given." (PCR 2174) This was demonstrated when Dr. Waldman asked Peterson if he feels depressed most of the time, despite being on death row in isolated circumstances. Subsequently, Peterson was penalized for giving a correct answer on the test, one that made sense, so he gets a point for telling the truth, a point meaning he's faking. (PCR 2175)

Dr. Frederick stressed the importance of standardized methods and testified that the purpose of a standardized procedure is to develop a pool of information that you can compare people to, and it only works if you agree to give the test the way that everybody else in that sample took the test. (PCR 2179) Dr. Frederick

testified that he uses standardized procedures in his assessment so that he can make reliable and valid conclusions about the individual that can be used to meet a standard. (PCR 2180) Dr. Frederick further cautioned the risk associated with failing to adhere to standardized procedures, stating that "you're depending on your intuition, your judgment to make decision, but there's a lot of variability associated with that. You may have bad judgment; you may have bad clinical intuition." (PCR 2180) He testified that in a standardized procedure, you are taking the element of the clinician out of the process so information can be provided that everyone agrees upon. (PCR 2180) Dr. Frederick testified that "reliability means repeatability. If it's not repeatable, it's not reliable. If it's not reliable, it can't be valid." (PCR 2181) Moreover, Dr. Frederick emphasized that whether or not someone lies about committing a crime does not have any bearing on the likelihood they will malinger a mental disorder, and to make that connection is not supportable. (PCR 2183)

Dr. Frederick testified there was nothing at all in the clinical interview that would remotely bring about the impression of malingering. (PCR 2190) Dr. Frederick stated that the situation involved an unsophisticated individual (Peterson) who is reporting some inner experiences, and there is "nothing in his manner that really suggests that he is highly exaggerating or distorting what his experiences are. He seems to freely acknowledge that he doesn't know what's happening."

(PCR 2191) Dr. Frederick also testified that a person conducting these tests has to be more responsible than basing their conclusion on malingering solely on whether that person stated something incorrectly. (PCR 2192)

Lastly, Dr. Frederick emphasized the importance of demeanor in a clinical setting. (PCR 2192) If the clinician shows they do not respect the individual, then they create a situation in which the clinician is not going to be able to reliably assess what is happening because the individual is not able to express it because now they do not trust the clinician. (PCR 2193) Once this occurs, the clinician cannot use clinical skill to elicit the sort of information that they need to make a reliable assessment about what the individual's inner processes are. (PCR 2193)

Dr. Waldman claimed to be an expert in malingering, however, he used a purely subjective clinical approach, he disregarded other standardized tests used to detect malingering, he was unfamiliar with the M-FAST instructions, and he did not conduct the M-FAST properly, which was further corroborated by the testimony of Dr. Frederick.

In the mere one paragraph of the trial court's order denying Peterson's motion to exclude the testimony of Dr. Waldman, the trial court's sole basis for denial is the fact that Dr. Frederick stated the best practice is to use standardized tests and the conclusions reached by Dr. Waldman "can" be based solely on clinical examinations. However, the trial's court's findings must be supported by

competent, substantial evidence. Blanco v. State, 702 So.2d at 1252. Dr. Frederick testified in-depth regarding the faulty scientific approach adopted by Dr. Waldman. Dr. Waldman did not seek to introduce conclusions based on sole clinical examinations; he sought to introduce conclusions based on standardized tests that he failed to complete in accordance with proper procedure. Therefore, the trial court did not have competent, substantial evidence and erred in denying Peterson's motion to exclude the testimony of Dr. Waldman.

CLAIM III

THE TRIAL COURT ERRED IN DENYING PETERSON'S CLAIM THAT HIS DUE PROCESS RIGHTS WERE VIOLATED WHEN TRIAL COUNSEL LOST OR DESTROYED PETERSON'S TRIAL RECORDS, THEREBY PROHIBITING APPELLATE COUNSEL FROM ADEQUATELY INVESTIGATING AND PLEADING CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL.

During the course of Fletcher's representation of Peterson, a conflict of interest arose in which there was a division of interests that adversely affected Fletcher's overall performance in this case. In addition to the numerous instances of ineffectiveness as alleged in Peterson's Motion for Postconviction Relief, Fletcher further violated Peterson's rights by destroying or conveniently losing Peterson's entire file.

To prove he or she was prejudiced by counsel's deficient performance, the defendant must show that counsel's errors were "so serious as to deprive the

defendant of a fair trial, a trail whose result is unreliable." Strickland v. Washington, 466 U.S. 688 (1984). All members of the defense have a duty to maintain the records of the case in a manner that will inform successor counsel of all significant developments relevant to the litigation. American Bar Association, American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, 31 Hofstra L. Rev. 913, 1074 (2003).

According to the American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, the guidelines that govern this issue are 10.13 – the duty to facilitate the work of successor counsel, and 10.14 – duties of trial counsel after conviction. American Bar Associate Guideline 10.13 states:

> In accordance with professional norms, all persons who are or have been members of the defense team have a continuing duty to safeguard the interests of the client and should cooperate fully with successor counsel. This duty includes, but is not limited to:
>
> A. maintaining the records of the case in a manner that will inform successor counsel of all significant developments relevant to the litigation;
>
> B. providing the client's files, as well as information regarding all aspects of the representation, to successor counsel;
>
> C. sharing potential further areas of legal and factual research with successor counsel; and
>
> D. cooperating with such professionally appropriate legal strategies as may be chosen by successor counsel.

American Bar Association Guideline 10.14 states:

> A. Trial counsel should be familiar with all state and federal post-conviction options available to the client. Trial counsel should discuss with the client the post-conviction procedures that will or may follow imposition of the death sentence.
>
> B. Trial counsel should take whatever action(s), such as filing a notice of appeal, and/or motion for a new trial, will maximize the client's ability to obtain post-conviction relief.
>
> C. Trial counsel should not cease acting on the client's behalf until successor counsel has entered the case or trial counsel's representation has been formally terminated. Until that time, Guideline 10.15.1 applies in its entirety.
>
> D. Trial counsel should take all appropriate action to ensure that the client obtains successor counsel as soon as possible.

In commentary to the guidelines section 10.13, the ABA explains,

> [T]his duty includes an affirmative obligation to maintain contemporaneous records that will enable successor counsel to have a factual predicate for the assertion of whatever legal claims may arise… Each counsel's files should be maintained in a manner sufficient to enable successor counsel to answer questions of this sort through appropriate documentation (e.g., notes of client interviews, telephone message slips, etc.). Even after team members have been formally replaced, they must continue to safeguard the interests of the client. Specifically, they must cooperate with the professionally appropriate strategies of successor counsel[]. And this is true even when (as is commonly the case) successor counsel are investigating or asserting a claim that prior counsel was ineffective.

The Supreme Court has accepted these guidelines in Wiggins v. Smith, 539 U.S. 510 (2003) ("Prevailing norms of practice as reflected in American Bar

Association standards and the like… are guides to determining what is reasonable." (quoting Strickland v. Washington, 104 S. Ct. 2052, (1984)).

Fletcher disregarded these guidelines. In fact, Fletcher testified that "I don't consult them (the ABA guidelines) that often. I just use my trial experience and what I learn when I go to the seminars." (PCR 1210-11). Defense counsel was ineffective and deficient when counsel lost or destroyed 11 boxes, thereby prejudicing Peterson.[1] Traci Sloan, an employer of the Regional Conflict Counsel's office, testified at the Evidentiary Hearing that she was responsible for retrieving and storing files at RCC. (PCR 1191) Ms. Sloan further testified that she did not receive nor did she have any record of receiving the 11 trial boxes that were in Fletcher's possession. (PCR 1192) Ms. Sloan also stated that she did not have any recollection of Fletcher bringing the 11 trial boxes to the RCC office. (PCR 1192)

[1] Interestingly, Peterson's is not the only case in which Fletcher lost or destroyed records. In his Motion to Vacate Judgments of Conviction and Sentence (pp.92-97) filed on April 22, 2016 in Duval County case 2008-CF-011059, Billy Jean Sheppard alleged that Fletcher lost or destroyed his files from trial. Fletcher appeared before the trial court on April 14, 2016 and reported that all of his files, including Mr. Sheppard's file, had been thrown away without warning by his former law partner and precious co-counsel on Mr. Sheppard's case, David Taylor. Fletcher also stated that he had an electronic file for Mr. Sheppard on his computer, but since this particular computer had crashed, he was unable to retrieve those documents. David Taylor denied that he or anyone from his office destroyed Fletcher's files. Taylor stated that Fletcher abandoned his files at Taylor's office after he was no longer working there. Taylor further state that Fletcher's confidential client files were left in an unsecured area of the lobby, where anyone could have either accessed them or disposed of them. Undersigned counsel did not become aware of this case until after the trial court issued its order denying Peterson's Motion for Postconviction Relief.

Fletcher acknowledged in his testimony that there was in fact approximately eleven trial boxes. Fletcher conceded there was nothing noted in his billing records to indicate he had in fact turned the files over to RCC. Fletcher acknowledged that Peterson asked the judge to order Fletcher to turn over his files because he was fearful he would destroy them. Moreover, Fletcher testified that the boxes contained the "State's discovery exhibits, copies of police reports, copies of depositions, DVD discs with interviews, phone calls, all that sort of stuff."

Because of the severely strained attorney-client relationship between Peterson and Fletcher, Peterson became concerned with the safekeeping of his records. On December 10, 2013, Peterson delivered a speech to the court during which he expressed his discontentment with his trial counsel and foreshadowed the destruction of his attorneys' trial materials. At the end of his address to the court, Peterson said, "[y]our honor, I'd also like, as soon as Fletcher is paid, all my defense files be turned over to Mr. Nolan for safekeeping. And that's all I have to say, Your Honor."

Mr. Nolan has since passed away and his files have all been accounted for. Undersigned counsel was able to review one of the boxes in RCC's possession. However, when undersigned counsel was appointed and inquired as to the location of Fletcher's boxes, he indicated that the boxes were no longer in his possession. Below is the e-mail conversation between Fletcher and undersigned counsel:

Good morning Fletcher,

I again request we be provided copies of Mr. Peterson's files in your possession. His case was recently affirmed by [the] Florida Supreme Court and time is of the essence. Please call or advise as soon as possible when we can pick up [the] requested material.

We await hearing from you.

Regards,
Frank Tassone

E-mail from Frank Tassone, Esq. to Chuck Fletcher, Esq. (Sept. 17, 2012, 09:01a.m. EST).

Frank,

Jim Nolan had all my files (11 boxes worth I think) at RCC.

Good luck and tell Robbie I said hi.

Chuck Fletcher

E-mail from Chuck Fletcher, Esq. to Frank Tassone, Esq. (Sept. 18, 2012, 12:35p.m. EST).

Good Afternoon Chuck,

Thanks for your reply. We previously reviewed the 1 box RCC had and, after your e-mail, contacted them again asking [sic] could they conduct another search for 10+ boxes. I spoke with the lady who worked with Mr. Nolan then and is now responsible for file storage. She said Mr. Nolan had only 1 box and they have no record or recollection of receiving boxes from your office.

I humbly and respectfully request you conduct another search of your storage are and advise whether the boxes are in your possession or control. Thanks in advance for your courtesy and cooperation. I eagerly await hearing from you.

> Regards,
> Frank

E-mail from Frank Tassone, Esq. to Chuck Fletcher, Esq. (Sept. 18, 2012, 02:14p.m. EST).

> Via e-mail On Tuesday, September 18, 2012, at 3:09pm, Chuck Fletcher wrote:
>
> Frank,
>
> Checked storage closet (its 10 feet from my office) and the 10 boxes are not there. That's because I loaded up my green forerunner and trucked them down to rcc's office the week of the penalty phase. Jim and I figured that was the best place to store them since they are a government agency.
>
> Chuck Fletcher

E-mail from Chuck Fletcher, Esq. to Frank Tassone, Esq. (Sept. 18, 2012, 03:09p.m. EST).

Peterson was severely prejudiced when trial counsel destroyed or conveniently lost 11 trial boxes, therefore impeding collateral counsel's task. As a result, collateral counsel was devoid of potential exhibits and attorney-client communications that would have existed if the boxes had not been intentionally lost or destroyed. Not only is Postconviction counsel prevented from evaluating what work, if any, Fletcher did to investigate and prepare for Peterson's trial, but Fletcher is also left with a way to deflect allegations of ineffectiveness. To further establish prejudice, the trial court repeatedly states in its Order Denying

Defendant's Motion that Peterson's allegations that trial counsel were ineffective are not supported by any evidence. The evidence would be located within these boxes that Fletcher lost or destroyed.

Surely Fletcher is aware that without the testimony of his second-chair counsel and without any records, Postconviction counsel has a difficult task in proving what was done, or was left undone, in Peterson's case. Fletcher's scheme of losing or destroying files when his clients are sentenced to death has the intended effect of preventing any meaningful review of his work by Postconviction counsel, and therefore violates Peterson's due process rights.

Where "a conflict of interest actually affects the adequacy of his representation," Peterson "need not demonstrate prejudice in order to obtain relief." Cuyler, 446 U.S. at 349-50. However, in Peterson's case, the prejudice is clear from the evidence asserted in all other claims of Peterson's Motion for Postconviction Relief.

CLAIM IV

TRIAL COURT ERRED IN DETERMINING THAT COUNSEL WAS NOT INEFFECTIVE IN THE GUILT AND PENALTY PHASE IN FAILING TO ESTABLISH AN ATTORNEY-CLIENT RELATIONSHIP, AND FAILING TO INVESTIGATE AND PRESENT EXPERTS AND LAY-WITNESSES WHICH DEMONSTRATE SUBSTANTIAL MITIGATION, UNDERMINING CONFIDENCE IN THE OUTCOME OF PETERSON'S TRIAL BECAUSE THE LOWER COURT'S FINDINGS ARE NOT SUPPORTED BY COMPETENT AND SUBSTANTIAL EVIDENCE IN VIOLATION OF HIS FIFTH, SIXTH, EIGHTH AND FOURTEENTH

AMENDMENT RIGHTS UNDER THE UNITED STATES AND FLORIDA CONSTITUTIONS.

At the post-conviction hearing, Peterson presented considerable evidence, both from forensic and lay witnesses that easily could have been presented at Peterson's trial to offer statutory and substantial non-statutory mitigators to the jury, but counsel failed to even consult with experts and conduct basic investigations to secure this evidence. The deficient performance in this case is glaringly apparent from the record, and the trial court's decision that there was no deficient performance is not supported by competent and substantial evidence. The trial court's ruling that confidence in the jury's verdict was not undermined was a misapplication of Strickland and should be reversed by this Court. Strickland v. Washington, 466 U.S. 668, 692 (1984).

The two elements for an ineffective assistance of counsel claim under the Sixth Amendment are (1) counsel's representation fell below an objective standard of reasonableness, and (2) but for counsel's deficiency, there is a reasonable probability the result of the proceeding would have been different. Id. at 688-89. A finding of prejudice under Strickland requires that a petitioner "must show that there is a reasonable probability that, but for counsels' unprofessional errors, the result of the proceeding would have been different." Id. at 694. Strickland defined "reasonable probability" as a "probability sufficient to undermine confidence in the

outcome" of the proceeding. Id. at 692. There cannot be confidence that the outcome of Peterson's trial would have been the same.

Failure to establish attorney-client relationship, and conflict of interest

Peterson's counsel was deficient in failing to establish an attorney-client relationship and failing to investigate and present substantial mitigation to the jury in order to combat the aggravators sought by the State. A new trial is required, as under Strickland v. Washington, this was clear ineffective assistance of counsel that severely prejudiced Peterson's case, in violation of his Fifth, Six, and Fourteenth Amendments rights to effective counsel and a fair trial.

Due to trial counsel's work load, trial counsel was operating under an actual conflict of interest which adversely affected his representation of Mr. Peterson, in that he failed to investigate, prepare and challenge the State's case[2]. At the time he represented Peterson, Fletcher was involved in six other capital cases, in addition to any non-capital cases.

[2] At the time he represented Peterson, in addition to non-capital cases, Fletcher represented the following defendants facing the death penalty:

1. Terrell Dubose: Duval Case No.: 16-2006-CF-0-018284
2. Derwin Lembrick: Duval Case No.:16-2008CF-011783
3. Cedric Cutter: Duval Case No.: 16-2008-CF-013580
4. Major Brown: Duval Case No.: 16-2006-CF-005153
5. Billy Shepard: Duval Case No.: 16-2008-CF-11059
6. Jermaine Wilson: Duval Case No.: 16-2007-CF-010153

During 2008-2010, Fletcher represented Billy Jean Sheppard, who was facing the death penalty. Regarding that case, ASA Mark Caliel sent an email to Fletcher dated November 12, 2010, stating:

> It is clear that the Defense is stretched too thin due to other responsibilities to adequately prepare this case for trial. While I empathize with having a busy schedule, this case is nearly two and a half years old, and but for a handful of depositions, very little has been done to prepare for trial.
>
> …
>
> It is not fair to the Defendants, who face execution, the victims' family (sic), or the State that the case is being handled in this manner. Perhaps it is necessary for you to move to withdraw from the case. Typically, I would be opposed to such an action due to the delay it would cause. However, I can't see it resulting in more of a problem than we have already experienced.[3]

According to the allegations in the email, Peterson's case was not the only one Fletcher was ignoring at the time. Peterson was denied his right to a zealous advocate. See Gideon v. Wainwright, 375 U.S. 335 (1963).

In such circumstances, "when advocate's conflicting obligations have effectively sealed his lips on crucial matters," "[t]he mere physical presence of an attorney does not fulfill the Sixth Amendment guarantee." Holloway v. Arkansas, 435 U.S. 475, 490 (1978). Mr. Peterson was deprived of his Sixth Amendment right to counsel because counsel's conflicting caseload as well as personal feelings against Mr. Peterson and his innocence deprived Mr. Peterson of his right "to

[3] See Motion to Vacate Judgments of Conviction and Sentence (pp. 92-97) filed on April 22, 2016 in Duval County case 2008-CF-011059, Billy Jean Sheppard

require the prosecution's case to survive the crucible of meaningful adversarial testing." Cronic, 466 U.S. at 656. In Strickland v. Washington, 466 U.S. 668, 692 (1984) , the United States Supreme Court found "when counsel is burdened by an actual conflict of interest . . . counsel breaches the duty of loyalty, perhaps the most basic of counsel's duties."

Failure to investigate and present mitigation evidence

Peterson's constitutional rights were further violated when trial counsel failed to investigation and present available evidence in the penalty phase of trial. The duty to investigate is a basic, yet critical duty of defense counsel: one of the primary duties defense counsel owes to his client is the duty to prepare adequately prior to trial. Pretrial preparation, principally because it provides a basis upon which most of the defense case must rest, is perhaps the most critical stage of a lawyer's preparation. Magill v. Dugger, 824 F. 2d 879, 886 (11th Cir. 1987). Equally critical is the duty to consult and present expert testimony in cases where the jury's interpretation of it is imperative. See Williams v. Thaler, 684 F. 3d 597, 604 (5th Cir. 2012), cert. denied, 133 S. Ct. 866, 184 L. Ed. 2d 679 (2013)(counsel's performance was unreasonable where it failed to "obtain any independent ballistics or forensics experts, and was therefore unable to offer any meaningful challenge to the findings and conclusions of the state's experts, many of which proved to be incorrect.").

At the evidentiary hearing, Fletcher indicated there was an investigator employed to work on Peterson's case; however, Fletcher could not recall what information was investigated. (PCR 1179) The only instance that Fletcher recalled was that the investigator aided in finding out if a particular witness had a criminal record. (PCR 1781) Moreover, Fletcher stated that he did not feel as though he needed to go out and interview Peterson's family members (PCR 1782) or take the depositions of various witnesses. (PCR 1782) Additionally, Fletcher deliberately chose not to hire any mental health experts to explore Peterson's mental conditions and further paint a "full picture" for the jury. Fletcher also acknowledged that previous doctors who examined Peterson requested additional records and recommended additional testing. Fletcher admitted these requests and recommendations were unanswered. (PCR 1783)

Counsel's failure to investigate and consult with experts and lay witnesses strips any trial decision from the deference entitled to a truly strategic decision. See Strickland, 466 U.S. at 690-91; Rose v. State, 675 So. 2d 567, 573 (Fla. 1996)("Case law rejects the notion that a 'strategic' decision can be reasonable when the attorney has failed to investigate his options and make a reasonable choice."). The decision of whether the failure to investigate was deficient cannot be made from hindsight or by a trial court assuming facts not in the record to manufacture a reasonable strategic decision, but rather it must be analyzed in light

of what the attorney knew at the time of trial preparation. See Alcala v. Woodford, 334 F. 3d 862, 871 (9th Cir. 2003)("We will not assume facts not in the record in order to manufacture a reasonable strategic decision for trial counsel.").

Defense counsel's deficient performance was evidenced by the lack of attorney client relationship developed between Fletcher and Peterson. Fletcher acknowledged Peterson wrote him a plethora of letters and most of those letters remained unanswered. However, one of the most compelling issues in Peterson's case lies in the deliberate decision not to put on statutory mitigation, despite the State seeking the two weightiest aggravators. Fletcher acknowledged the deliberate decision to not put on any statutory mitigators and only chose to present a weak defense in hopes the jury would see the "good character" in Peterson. (PCR 1270-1271) Furthermore, Fletcher repeatedly alluded to the details of the crime, yet he provided no explanation as to the strategy behind presenting an incomplete defense depicting an incomplete picture of Peterson.

The trial court's order wholly ignores Fletcher's acknowledgement of deliberately choosing not to present the jury with statutory mitigators. As such, there can be no establishment of any sound or reasonable strategy. Peterson has established counsel's deficiency and this Court's analysis should move to the prejudice analysis.

Further, Dr. Krop's records (PCR 635) indicate that on June 7, 2006 Dr. Krop "strongly recommend[ed]" to trial counsel that Mr. Peterson be referred for a neuropsychological evaluation to determine the nature and extent of any cognitive deficits related to possible brain damage sustained by several significant head injuries. On July 23, 1999, Dr. Krop stated in a letter to Nolan that he has received minimal discovery in the case and requested the opportunity to review all depositions that have been taken and a copy of the transcript of the taped statement made by the Defendant. He also requested to review medical records *previously requested*, particularly those pertaining to the Defendant's head injuries, as well as school records and any records pertaining to the Defendant's prior criminal history including PSIs. He also recommended again that Peterson be referred for a neurological evaluation, although he states that the neuropsychological testing was not particularly significant. (PCR 633) (Def. Exhibit B) On August 11, 2009, (the first day of Peterson's trial), Nolan sent a letter to Dr. Krop asking him to proceed with an MRI and PET scan and neuropsychological screening (although, obviously unbeknownst to counsel this testing was outside the purview of Dr. Krop's expertise, which is why Dr. Krop suggested counsel have Peterson referred for the testing) and included with his letter "Medical Records" and "School Records." (PCR 631) (Def. Exhibit B). Nolan stated that he would fax over additional documents as they become available. (PCR 631) (Def. Exhibit B) As there is no

further correspondence in either Nolan's records nor Dr. Krop's records, it is safe to assume that Nolan did not provide Dr. Krop any further information. (Def. Exhibit B) Fletcher testified, however, that based on the facts of the underlying crime, "[Peterson] was very, very aware of what he was doing… and that demonstrates to me that there's nothing wrong with him." (PCR 1070) Fletcher testified further that "[n]othing – nothing about my meetings with [Peterson] and my conversations with him indicated to me that he needed any of those sorts of tests being done."

This Court must conduct a plenary review of whether the new evidence rises to the level of undermining confidence in the original trial verdict. Bailey v. State, 151 So. 3d 1142, 1148 (Fla. 2014)(citing Stephens v. State, 748 So. 2d 1028, 1033 (Fla. 1999)). While this Court must defer to the trial court's factual findings and credibility determinations, no deference is owed to the legal conclusion of whether prejudice has been established. Id. At the sentencing hearing, the jury did not hear the following mitigating information regarding Peterson's life:

- Multiple head injuries (PCR 1403)
- Peterson's mother divorced from two husbands and would not let him have contact with his father or father's family (PCR 1396-98)
- Exposure to suicide. Peterson's uncle committed suicide and his mother attempted suicide (PCR 1396-97)

- Peterson's substance abuse as a juvenile (PCR 1397)
- History of several interrupted primary attachments (PCR 1398)
- Domestic violence in the home. Peterson's mother shot at Peterson's father with a gun (PCR 1398)
- Peterson observed his grandmother have psychotic episodes (PCR 1400)
- Peterson witnessed his grandfather's brutal behavior. Peterson's grandfather hit and injured people, including Peterson, broke their bones, knocked their teeth out, and was extremely violent in the home and community. Peterson's grandfather had a reputation for being a killer (PCR 1401)
- Sexual abuse. Peterson was molested by his uncle. Peterson was asked to perform oral sex on him or manually stimulate him when Peterson was preschool age. Peterson's mother witnessed one of the incidents (PCR 1402)
- Peterson suffered physical abuse as a child. Peterson was abused by his grandfather and his uncle. Peterson's uncle told him that his dad was dead and it was his fault (PCR 1403)
- Peterson had little interaction with his father when he was young and didn’t discover he had a brother until he was almost through grade school (PCR 1398)
- Peterson witnessed his father be brutally beaten by his grandfather (PCR 1409)

- Peterson had multiple dissociative episodes in order to disengage himself from the stressful environment he grew up in (PCR 1409-10)
- Peterson was present when his grandfather brutally raped his grandmother. Peterson heard the incident as it was occurring and saw the aftermath of his grandmother's injuries (PCR 1410)
- Peterson grew up in a violent and poor neighborhood with lots of drugs, prostitution, crime, alcoholism, people carrying weapons, people performing incestuous acts on their children, and young girls being prostituted out (PCR 1411)
- Peterson witnessed his uncle kill his pet rabbits (PCR 1412)
- Peterson's home had sewage overflow from the septic tank in the yard and it overflowed daily (PCR 1414)
- Peterson was bullied in the neighborhood (PCR 1414)
- Peterson witnessed violence, stabbings, and drug deals in the neighborhood (PCR 1414-1415)
- Peterson began using drugs at a young age, around 12 years old, and by age 15 he was already addicted to cocaine (PCR 1420)
- Peterson was supplied drugs by his own father (PCR 1422)
- Peterson was addicted to drugs and alcohol (PCR 1428)
- Peterson self-mutilated (PCR 1425)

- Peterson was held at gunpoint with his father. Peterson and his father were stripped naked and walked into a room with gun barrels in their mouth. Peterson had to witness his father be beaten while the gun barrel remained in his mouth (PCR 1430-31)
- Peterson's ex-wife, Lisa, was raped during a robbery while Peterson was held hostage and forced to listen (PCR 1428)
- Peterson suffered from maltreatment by his grandfather, uncle, and kids in the neighborhood. Peterson's mother neglected him and he had abusive interactions with his stepfather, Bobby Jenkins (PCR 1442)
- Peterson had an unstable family structure (PCR 1444)
- Several psychological stressors were found, including: growing up in a home with a substantial amount of violence, Peterson not being allowed to see his father, repeated attachment problems, having a father who was a criminal, having a violent grandfather, Peterson witnessing his grandmother be raped, Peterson learning how to disassociate so he could bear the stress of being in an environment, the stress of growing up in a criminal neighborhood, stress of growing up poor, stress or growing up with parents who were divorced, and the stress of growing up with an abusive stepfather. (PCR 1458)

Even assuming the trial court did not err in ordering that both Strickland prongs had not been met, this Court has repeatedly reversed cases and ordered new

penalty phases based on similarly significant mitigation uncovered in post-conviction, as the result of an utterly deficient mitigation investigation at trial. Hurst v. State, 18 So. 3d 975 (Fla. 2009); Phillips v. State, 608 So. 2d 778, 783 (Fla. 1992); State v. Lara, 581 So. 2d 1288, 1289 (Fla. 1991) (prejudice established by evidence of statutory mitigating factors and abusive childhood that was not presented). Prevailing professional norms required Peterson's counsel to conduct a thorough investigation into his background. Porter, 130 S. Ct. 447. Counsel also must not ignore pertinent avenues for investigation of which he or she should have been aware. Id. at 453. "[I]t is axiomatic that 'counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.'" Hurst, 18 So. 3d at 1008 (quoting Strickland, 466 U.S. at 691). Counsel may be deemed ineffective at the penalty phase where the investigation of mitigating evidence is "woefully inadequate" and credible mitigating evidence existed which could have been found and presented at sentencing. See Hildwin v. Dugger, 654 So. 2d 107, 109 (Fla. 1995); see also *State v. Lewis*, 838 So. 2d 1102, 1113 (Fla. 2002) ("[T]he obligation to investigate and prepare for the penalty phase portion of a capital case cannot be overstated- this is an integral part of a capital case"); Ragsdale v. State, 798 So. 2d 713, 718-719 (Fla. 2001).

The Florida Supreme Court finds deficient performance in deficient mitigation investigations when the investigation involves brief contact with a few family members and a failure to provide experts with background information. See Sochor, 883 So. 2d at 772. Deficient performance has also been found when a defense expert requests background information and/or testing to be completed and counsel fails to contact the expert and provide him this information. Douglas, 141 So. 3d at 122.

In the instant case, it is undeniable that counsel failed under professional norms at the time of Peterson's trial in his 'obligation to conduct a thorough investigation of the Defendant's background. Porter, 130 S. Ct. at 453; see also Sears, 130 S. Ct. at 4364; Wiggins, 539 U.S. 519; Simmons, 105 So. 3d at 475; Robinson v. State, 95 So. 3d 171 (Fla. 2012); State v. Walker, 88 So. 2d 128 (Fla. 2012); Hurst, 18 So. 3d at 1014; Cooper v. DOC, 646 F. 3d 1328, 1352 (11th Cir. 2011); Ferrell v. Hall, 640 F. 3d 1199, 1226-27 (11th Cir. 2011); Johnson v. DOC, 643 F. 3d 907, 931 (11th Cir. 2011).

Counsel's inactions constitute deficient performance and mirrors the deficient performances found in prior FSC opinions reversing defendants' sentences. See e.g. Griffin v. State, 114 So. 3d 890, 908 (Fla. 2013)(At penalty phase at trial, counsel presented "good guy" defense which included family members and friends testifying about his good work ethic and law-abiding life

until he got hooked on cocaine. However, at the post-conviction hearing, a "wealth" of mitigation was introduced concerning the severity of Griffin's drug use, the use of drugs at the time of the offense, his family history of alcohol and drug abuse and mental illness, his history of depression, and the impact of his prior brain injury. Griffin's trial attorney conceded he did not compile a family, medical, or social history, did not request a neuropsychiatric evaluation, and did not hire the penalty phase mental health expert until late in the process and did not give any medical records to his expert. Griffin's death sentence was vacated and given a new penalty phase because on counsel's deficient performance and the prejudice it caused).

This case is strikingly similar to the Bright case recently decided by this Court. State v. Bright, (FSC No. SC14-1701 decided June 16, 2016). In Bright, counsel's performance was found deficient where counsel never attempted to meaningfully investigate mitigation, although substantial mitigation could have been presented including medical history, educational history, employment and training history, family and social history, prior adult and juvenile correctional experience, and religious and cultural influences. Id. This Court found that where available information indicated that the defendant may have mental health issues, an evaluation of such nature was necessary. Id. The mental health expert in that case was never afforded the opportunity to present an informed opinion. Id.

Moreover, the Court stated that the failure to follow up cannot be explained by concerns about harmful evidence because Bright had not been diagnosed with any antisocial or psychopathic traits. Id. Similarly, although family members and Bright himself suggested that no mitigation was available, but information implied otherwise, counsel must further investigate. Id. Defense counsel's utter failure to follow up was not reasonable under prevailing norms of professional conduct. Id. The evidence presented in postconviction confirmed the mental health expert's suspicions that Bright was suffering from emotional and mental health issues. Id. Bright had been "Baker Acted," was taking medication, and was suicidal, yet this was never further investigated by counsel. Id. Additionally, Bright's school records revealed a pattern of poor grades as the result of a horrific childhood; these records were never fully investigated. Id. When counsel interviewed Bright's sister, she was not instructed to describe the state of their abuse or their home – only what kind of child Bright was. Id. Additionally, Bright's older brother was physically and mentally abusive.

Similar to the Bright case, trial counsel testified that it was strategy not to present any mental health witnesses before the jury. However, trial counsel did not even send Dr. Krop any requested documents until the trial had begun. Trial counsel never fully provided Dr. Krop the documents he requested. It cannot be

said that counsel's decision was strategic when Dr. Krop never made a fully informed diagnosis.

Fletcher acknowledged the deliberate strategy of the "good guy" defense in order to show that Peterson was a good guy who just somehow ended up doing the wrong thing. (PCR 1270-71) Counsel presented only a few witnesses to testify as to Peterson's career in racing and his employment. (PCR 1263) Defense counsel chose this defense despite knowing a substantial amount of mitigating evidence and decided not to present it to the jury to further explain Peterson's behavior. Instead, the jury was left confused as to why a seemingly "good guy" would commit the crime at issue. Counsel was required to present to the jurors "the full picture of mitigation" – yet counsel presented only a few witnesses to play into Peterson's "good guy" defense, even though counsel acknowledged that the State was seeking two of the weightiest aggravators. (PCR 1263-64) Furthermore, counsel also acknowledged that he was aware of a substantial amount of mitigating information and yet deliberately chose not to present it to the jury. (PCR 1265-66) Fletcher ignored this mitigating information and did not conduct additional investigation, including requesting any records and interviewing various family members.

This Court has rejected notions that the existence of weighty aggravators will defeat the need for a new penalty phase when substantial mitigation exists,

like in Peterson's case, that was not presented to the jury. See Hurst, 18 So. 3d at 1014. In Parker v. State, 3 So. 3d 974, 984 (Fla. 2009), the case was reversed for a new penalty phase where counsel presented only "bare bones" mitigation at trial and substantial mental mitigation and mitigation concerning Parker's childhood were discovered and presented at the post-conviction evidentiary hearing.

Fletcher's argument that his decision not to present mitigation constituted sound strategy is clearly invalid. A reasonable, strategic decision must be based on informed judgment, something that was utterly lacking in Peterson's case. The argument that some of counsel's tactics were "strategic" is meritless. See Wiggins, 539 U.S. at 527-28 (2003) (finding counsel's decision "to abandon their [mitigation] investigation at an unreasonable juncture ma[de] a fully informed decision with respect to sentencing strategy impossible"). Thus, counsel performed below the reasonable norms in the community and Peterson has proven both Strickland prongs--- deficient performance and prejudice. Accordingly, Peterson's sentence should be vacated. See Shellito v. State, 121 So. 3d 445, 459 (Fla. 2013)(Death sentence reversed where post-conviction evidence "shows a different picture of Shellito's upbringing than what was presented at trial. Based on consideration of the plethora of available mitigation and the dearth of mitigation actually presented, when reweighed against the aggravation in this case, the confidence in the outcome of the penalty proceeding is undermined.").

CLAIM V

PETERSON'S DUE PROCESS RIGHTS WERE VIOLATED WHEN THE TRIAL COURT DENIED HIS MOTION TO APPOINT DR. MORTON IN POSTCONVICTION.

On August 21, 2014, Peterson filed a Motion to under seal to Retain a Psychopharmacologist, Dr. Morton. (PCR 429) Among other things, Peterson alleged, "without Dr. Morton's testimony, the mitigation resulting from Peterson's above addictions and psychiatric disorders may lead to his mitigation claim being unexhausted in state court, leaving an inadequate remedy at the state level to address counsel's claim concerning defense counsel's effectiveness at the penalty phase of Peterson's trial. (PCR 430, para. 12) The trial court denied Peterson's motion to appoint Dr. Morton in an order dated September 25, 2014, finding that Dr. Morton had already testified in this case and that his testimony would amount to nothing more than bolstering his previous testimony. (PCR 502).

On December 18, 2014, during the evidentiary hearing, counsel sought to introduce Dr. Morton's billing records, Dr. Morton's curriculum vitae and his correspondence to and from trial counsel Nolan as an evidentiary exhibit. (PCR 1658) The state attorney, Richard Mantei, objected to the exhibit being introduced stating, "... [Dr. Morton] is another witness who was supposed listed and going to be called in these proceedings. And he's not here." (PCR 1658). He stated that the exhibit would be cumulative to what Dr. Morton already said and further,

> This appears to be a way to try to get additional things from Dr. Morton into the record that Dr. Morton isn't prepared to come in here and defend for whatever reason. I don't know what – what to say about why he's not here other than to say he isn't. That deprives me of the opportunity to challenge his conclusions in this report. It deprives me the opportunity to ask him about what else he and Mr. Nolan might have talked about and why what response Mr. Nolan may have made to him regarding why he might have not done some of this. Can't do that without him being here. (PCR 1569)

Undersigned counsel reminded the court that counsel had asked to appoint Dr. Morton for this hearing and was denied the opportunity to do so. (PCR 1660). Undersigned counsel also stated that the goal in calling Dr. Morton and admitting his notes and report was in regard to trial counsel's ineffectiveness and is therefore not cumulative to what Dr. Morton testified to previously. (PCR 1660) Undersigned counsel further reminded the court and the state that the state objected to the appointment of Dr. Morton in post-conviction. (PCR 1660-61) Ultimately, the trial court denied Peterson's request to submit Dr. Morton's correspondence, notes, and billing entries into evidence. (PCR 1664)

Had trial counsel admitted Dr. Morton's records, it would have shown that the first time Nolan consulted with Dr. Morton was September 30, 2009, after the jury had delivered its verdict. Dr. Morton had consulted with Peterson's prior counsel- Al Chipperfield- but had not been contacted by Nolan until weeks prior to the Spencer hearing. Had trial counsel allowed Dr. Morton to testify in Postconviction, this issue would have been elaborated further.

Defendant was prejudiced by the court's refusal to submit Dr. Morton's records into evidence. Dr. Morton was the only mental health expert who testified in Peterson's trial. His testimony was not presented to the jury; Dr. Morton testified at the Spencer hearing. Peterson alleged in his motion for Postconviction relief that trial counsel failed to supply their expert with adequate records and failed to prepare their expert for the hearing. The court found that the defendant did not meet his burden and that Peterson's claims were speculative. Because the court refused to admit Dr. Morton's correspondence with trial counsel, and refused to allow Dr. Morton to testify at the evidentiary hearing, trial counsel prevented Peterson from adequately presenting this claim.

CLAIM VI

THE HURST JUDGMENT APPLIES TO PETERSON BECAUSE PETERSON WAS SENTENCED TO DEATH UNDER THE NOW-UNCONSTITUTIONAL FLORIDA DEATH PENALTY SCHEME.

The Hurst judgment determined that Florida's death penalty scheme violates the Sixth Amendment of the United States Constitution because "[t]he Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence to death. A jury's mere recommendation is not enough." Hurst, 136 S.Ct at 619. This Court may not need to address retroactivity because the Florida legislature has determined in Fla. Stat. § 775.082(2) that if the death penalty is declared unconstitutional, a court can change a death sentence to life in prison to a

person previously sentenced to death. However, should this Court retroactivity, the United States Supreme Court has ruled that as long as the new rule is constitutional in nature, the rule is retroactive to cases on collateral review in state courts. Montgomery v. Louisiana, 136 S.Ct. 718, 729 (2016).

This Court has established a three-prong test to determine whether retroactivity applies in capital cases in Witt v. State, 387 So. 2d 922, 931 (Fla. 1980). The three-prong test set forth in Witt is (1) the change emanates from the Florida Supreme Court or the United States Supreme Court, (2) the change is constitutional in nature, and (3) the change constitutes a development of fundamental significance. Id.

A. The Hurst judgment is retroactive because it meets the three prong test announced in Witt.

In Witt, this Court recognized that major constitutional changes are likely to constitute a development of fundamental significance when they are within two broad categories. Id. at 929 ("specific determinations regarding the significance of various legal development must be made on a case-by-case basis, history shows that most major constitutional changes are likely to fall within two categories"). The two broad categories are:

> Those changes of law 'which places beyond the authority of the state the power to regulate certain conduct or impose certain penalties' and the second are 'those changes of law which are sufficient magnitude to necessitate retroactive application as ascertained by the three-fold test of [the United States Supreme Court's decisions in] Stoval v.

Denno, 388 U.S. 293 (1967) and Linkletter v. Walker, 381 U.S. 618 (1965).

Falcon v. State, 162 So.3d 954, 961 (Fla. 2015) (quoting Witt, 387 So.2d at 929). This Court made a three-fold analysis to determine the fundamental significance under Stovall and Linkletter by stating "(a) the purpose to be served by the new rule; (b) the extent of reliance on the old rule; and (c) the effect on the administration of justice of a retroactive application of the new rule." Witt, 987 So.2d at 926.

In Falcon, this Court applied the Witt test for retroactivity to determine "whether the rule established in Miller v. Alabama, 132 S.Ct 2455, 2460 (2012), 'that mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment[],' should be given retroactive effect?" 162 So.3d at 956. This Court held that "Miller applies retroactively to juvenile offenders whose convictions and sentences were final at the time Miller was decided." Id. This Court determined the case of Falcon to meet the first two prongs of Witt by stating "Miller is obviously a decision emanating from the United States Supreme Court, and its holding that the Eighth Amendment 'forbids a sentencing scheme that mandates life in prison . . . for juvenile offenders' is clearly constitutional in nature" Id. at 960 (quoting Miller, 132 S.Ct. at 2469.). The fundamental significance prong of Witt was also established in Falcon because "Miller has dramatically disturbed the power of the State of Florida to impose a

nondiscretionary sentence of life without parole on a juvenile convicted of a capital felony." Id. at 961 (quoting Toye v. State, 133 So.3d 540, 543 (Fla. 2d DCA 2014)).

Here, the Hurst judgment meets the three prong test of Witt and therefore applies to Peterson because the Hurst judgment is retroactive. The three prong test of Witt is met because the Hurst judgment (1) emanated from the United States Supreme Court; (2) is constitutional in nature because the United States Supreme Court held that Florida's death sentencing scheme violates the Sixth Amendment of the United States Constitution; and (3) constitutes a development of fundamental significance.

B. The rule announced in Hurst is a substantive rule because it is Constitutional in nature and substantive rules regarding the Constitution are retroactive to cases on collateral review

The United States Supreme Court has determined that when a new substantive rule is announced, the substantive rule is retroactive to cases on collateral review. Montgomery v. Louisiana, 136 S.Ct. 718, 729 (2016) ("The Court now holds that when a new substantive rule of constitutional law controls the outcome of a case, the Constitution requires state collateral review courts to give retroactive effect to that rule."). On the other hand, when a new rule is procedural, the new rule does not apply retroactively. Schriro v. Summerlin, 542 U.S. 348, 352 (2004). The United States Supreme Court defines procedural rules as those

which "regulate[] only the manner of determining the defendant's culpability." Montgomery, 136 S.Ct. at 732 (quoting Schriro, 542 U.S., at 353.). Whereas the United States Supreme Court defines substantive rules as those rules that forbid "criminal punishment of certain primary conduct" or those that prohibit "a certain category of punishment for a class of defendants because of their status or offense. Id. (quoting Penry v. Lynaugh, 492 U.S. 302, 330). The new rule announced in Montgomery is that so long as the substantive rule is constitutional in nature, the Constitution requires state collateral review courts to apply the substantive rule retroactively. Id. at 729.

In Montgomery, the United States Supreme Court had to determine whether the rule announced in Miller v. Alabama, 132 S.Ct. 2455 (2012), holding that a juvenile convicted of a homicide offense could not be sentenced to life in prison without parole, is retroactive to juvenile cases whose convictions and sentences were final when Miller was decided. Id. at 725. The State of Louisiana argued that Miller was not retroactive because "[Miller] did not place any punishment beyond the State's power to impose; it instead required sentencing courts to take children's age into account before condemning them to die in prison." Id. at 734. However, the United States Supreme Court ruled against the State of Louisiana because "Miller, then, did more than require a sentence to consider a juvenile offender's youth before imposing life without parole; it established that the penological

justifications for life without parole." Id. The Court further determined that Miller "rendered life without parole an unconstitutional penalty for 'a class of defendants because of their status'—that is, juvenile offenders whose crimes reflect the transient immaturity of youth." Id. Therefore, Miller is a substantive rule of constitutional law and is retroactive because "[Miller] 'necessarily carr[ies] a significant risk that a defendant'—here, the vast majority of juvenile offenders—'face[] a punishment that the law cannot impose upon him.'" Id. (quoting Shiro, 542 U.S. at 352; Bousley v. United States, 523 U.S. 614, 620 (1998)).

The same analysis the United States Supreme Court applied in Montgomery by declaring the Miller rule retroactive can be applied to Peterson by this Court declaring the Hurst rule retroactive. Since Hurst is constitutional in nature because it specifically declared Florida's death penalty scheme unconstitutional for violating the Sixth Amendment, the Hurst ruling is retroactive.

1. The Hurst judgment applies to Peterson because Hurst is a constitutional substantive rule.

The United States Supreme Court determined "[a] penalty imposed pursuant to an unconstitutional law is no less void because the prisoner's sentence became final before the law was held unconstitutional." Montgomery, 136 S.Ct. at 731. When a defendant is convicted under an unconstitutional law, the conviction "is not merely erroneous, but is illegal and void." Id. (quoting Ex Parte Siebold, 100 U.S. 371, 376-77 (1880)). State collateral review courts have no greater power

than federal habeas courts to mandate that a prisoner continue to suffer punishment barred by the Constitution. Id.

Justice Scalia wrote a dissenting opinion in Montgomery based on the fact that the defendant's conviction was final half a century before the United States Supreme Court decided Miller. Id. at 737. (Scalia, J., dissenting) ("One would think, then, that it is none of our business that a 69-year-old Louisiana prisoner's state-law motion to be resentenced according to [Miller], a case announced half a century after sentence was final, was met with a rejection on state-law grounds by the Louisiana Supreme Court."). However, the majority in Montgomery agreed that "there is no grandfather clause that permits States to enforce punishments the Constitution forbids." Id. at 731. The majority further stated:

> Where state collateral review proceedings permit prisoners to challenge the lawfulness of their confinement, States cannot refuse to give retroactive effect to a substantive constitutional right that determines the outcome of that challenge. Id.

Although Peterson was convicted in 2009, it was the judge and not a jury that sentenced Peterson to death. Since the United States Supreme Court determined in Hurst that Florida's death penalty scheme is unconstitutional, Peterson's penalty is void. Peterson's sentence to death by a judge and not a jury is barred by the Constitution.

C. This Court may not need to address retroactivity because the Florida Legislature has determined that if the death penalty is declared unconstitutional a court can convert the sentence to life in prison.

Peterson was sentenced to death under the death penalty law that the United States Supreme Court determined to be unconstitutional. This Court should follow the clear path set forth by the Florida Legislature in Fla. Stat. § 775.082(2) which states:

> ***In the event the death penalty in a capital felony is held to be unconstitutional*** by the Florida Supreme Court or the United States Supreme Court, the court having jurisdiction over a person previously sentenced to death for a capital felony shall cause such person to be brought before the court, and ***the court shall sentence such person to life imprisonment as provided in the subsection*** (1).

(emphasis added). This Court has interpreted this statute by stating "the legislation intended that the penalties set out in subsection 775.082(1) be fully applied to the extent that they are constitutionally permissible." Rusaw v. State, 451 So.2d 469, 470 (Fla. 1984). Since the Hurst judgment determined Florida's death penalty scheme is no longer constitutionally permissible, this Court should apply § 775.082(2) and sentence Peterson to life.

In Rusaw, a jury convicted the defendant for "sexual battery upon a person eleven years of age or younger by a person eighteen or older." 451 So.2d at 470. The defendant was sentenced to life imprisonment by applying Fla. Stat § 794.011(2). Id. On appeal, the defendant "argued that he could be sentenced for no more than a life felony because the crime he committed is no longer subject to the death penalty and is, therefore, no longer a capital crime." Id. The defendant

relied on this Court's decision in Buford v. State, 403 So.2d 943 (Fla. 1981) where this Court held "a death sentence for committing the crime proscribed by subsection 794.011(2) is so grossly disproportionate and excessive as to be constitutionally prohibited." Id. This Court in Buford reduced the defendant's death sentence to life imprisonment under Fla. Stat. § 775.082(1). Id. (citing Buford, 403 So.2d at 954.). Thus, this Court applied Buford to Rusaw and determined "[d]eath is no longer permissible for the sexual battery described in subsection 794.011(2), but life imprisonment with a twenty-five-year minimum mandatory is." Id.

Rusaw is analogous with Peterson's case because death is no longer permissible to defendants that have been sentenced by a judge. The Florida legislature made it clear in Fla. Stat. § 775.082(2) that when the United States Supreme Court determines the Florida death penalty unconstitutional, a person previously sentenced to death shall have the sentence of life imprisonment. Since Hurst made Florida's death penalty unconstitutional, Peterson shall be sentenced to life imprisonment.

This Court may not need to apply retroactivity if this Court follows Fla. Stat. § 775.082(2). However, if this Court addressed retroactivity and does not hold Hurst to apply retroactive, this Court will not only conflict with the United States Supreme Court holding in Montgomery v. Louisiana, 136 S.Ct. 718 (2016), but

also this Court's holding in Falcon v. State, 162 So.3d 954 (Fla. 2015). The Hurst judgment applies to Peterson.

CLAIM VII

THE TRIAL COURT IMPROPERLY DENIED THE CLAIMS BELOW, FOR WHICH PETERSON RELIES ON HIS MOTION TO VACATE JUDGMENT AND SENTENCE UNDER RULE 3.851 AND SUBMITS WITHOUT BRIEFING.

a. Trial Counsel was ineffective and deficient in failing to challenge five of the potential jurors who ultimately sat as jurors in trial for cause, failing to investigate or inquire about jury tampering, and failing to object to police presence throughout trial, penalty phase and sentencing in violation of Peterson's rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments of the U.S. Constitution and Corresponding Provisions of the Florida Constitution.

b. Trial counsel was ineffective for stipulating to the entrance of the confession as evidence without requiring Jackson's testimony to introduce the taped confession in violation of Peterson's rights under the Fifth ,Sixth, Eighth, and Fourteenth Amendments of the U.S. Constitution and corresponding provisions of the Florida Constitution.

c. Trial counsel was ineffective and deficient for failing to hire experts to show Peterson's mental impairments in violation of Mr. Peterson's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments of the U.S. Constitution and corresponding provisions of the Florida Constitution.

d. Peterson's penalty phase counsel provided ineffective assistance as he was not death penalty qualified nor did his agency have funding for death penalty representation and thereby labored under a conflict of interested, in violation of Peterson's rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments of the U.S. Constitution and corresponding provisions of Florida's Constitution.

e. Trial counsel was ineffective and deficient in failing to object to prosecutorial misconduct and inadmissible hearsay during closing

arguments in the guilt and penalty phase which constituted fundamental error and violated Peterson's rights under the Fifth, Sixth, Eighth and Fourteen Amendments of the U.S. Constitution and Corresponding Provisions of the Florida Constitution.

f. Peterson is being denied his constitutional rights and the effective assistance of counsel under the rules prohibiting Peterson's Postconviction counsel from interviewing jurors in violation of Peterson's rights under the Fifth, Sixth, Eighth, and Fourteenth amendments of the U.S. Constitution and corresponding provisions of Florida's Constitution.

g. The state improperly withheld material evidence in violation of Brady v. Maryland constituting prosecutorial misconduct and therefore denied defendant of his constitutional rights guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments of the U.S. Constitution and corresponding provisions of Florida's Constitution.

h. As a result of Peterson's expert not being provided all the documents necessary to conduct an effective mental health evaluation, Peterson was denied his right to effective mental health assistance required under Ake v. Oklahoma in violation of Peterson's rights under the Fifth, Sixth, Eighth, and Fourteenth amendments of the U.S. Constitution and corresponding provisions of Florida's Constitution.

i. Florida's Capital Sentencing Scheme is unconstitutional because it allows trial courts unfettered discretion to assign weights to mitigating and aggravating factors without providing a baseline for their discretion in violation of Peterson's rights under the Fifth, Sixth, Eighth, and Fourteenth amendments of the U.S. Constitution and corresponding provisions of Florida's Constitution.

j. Duval County prosecutors' discretionary use of the death penalty is arbitrary and thus violates the Eighth Amendment's prohibition of cruel and unusual punishment as announced in Furman v. Georgia.

k. Florida's use of the death penalty violates the Eighth Amendment's evolving standards of decency because juries are not required to issue a unanimous death sentence and the state still adheres to widely criticized practice of allowing a judge to override a jury's life verdict.

l. The cumulative prejudice resultant from numerous instances of trial counsels' deficient performance resulted in an unfair trial in violation of Peterson's rights under the Fifth, Sixth, Eighth, and Fourteenth amendments of the U.S. Constitution and corresponding provisions of Florida's Constitution.

m. Peterson is innocent of first degree murder.

CONCLUSION

In following the United States Supreme Court and the Florida Supreme Court's holdings above, Peterson's sentence must be remanded for a new trial and a new penalty phase. The mitigation presented at Peterson's evidentiary hearing was qualitatively and quantitatively different from that presented at trial, and included substantial evidence concerning both his mental and cognitive conditions, consistently recognized as "mitigating factors" of the most weighty order. See Hurst, 18. So. 3d at 1014 (quoting Rose, 675 So. 2d at 573).

Many other serious mitigating factors concerning Peterson's social, environmental, and socioeconomic backgrounds were also introduced, depicting a picture of someone who did not have everything going for him; an individual who truly was disadvantaged, even prior to birth. Peterson's jury heard "almost nothing" in this regard. See Simmons, 105 So. 3d at 507.

Although trial counsel had access to Peterson's family background and personal mitigation, they ignored this information and failed to investigate further

in order to present powerful mitigation to the jury. A reasonable probability exists that jurors would have struck a different balance had they heard the complete history of this unfortunate individual. Wiggins, 539 U.S. at 537. Both the Strickland prongs have been met, and a new trial and penalty phase is warranted.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND AS TO FONT

I HEREBY CERTIFY that this brief is submitted by Appellant, using Times New Roman, 14 point font, pursuant to Florida Rules of Appellate Procedure, Rule 9.210. Further, Appellant, pursuant to Florida Rules of Appellate Procedure, Rule 9.210(a)(2), gives Notice and files this Certificate of Compliance as to the font in this immediate brief.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been sent via electronic mail to the Office of the Attorney General at carine.mitz@myfloridalegal.com, Attorney for Appellee, and the Office of the State Attorney, Richard Mantei, at rmantei@coj.net this 15th day of July, 2016.

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